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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GABRIEL ZENDEJAS-CHAVEZ,

Defendant.

No. 2:18-cr-00173(A)-GW-2

GOVERNMENT'S MOTION IN LIMINE NO. 2 EXCLUDING A DURESS DEFENSE

Trial Date: August 2, 2022
Trial Time: 8:30 a.m.
Location: Courtroom of the
Honorable George H. Wu

Plaintiff United States of America, by and through its counsel of record, the Acting United States Attorney for the Central District of California and Assistant United States Attorneys Shawn J. Nelson, Gregory Bernstein, Keith D. Ellison, and Gregg E. Marmaro, hereby files its Motion in Limine No. 2, to exclude a duress defense. Defendant has not, and cannot, make a sufficient pretrial showing supporting such a defense.

1 This Motion is based upon the attached memorandum of points and
2 authorities, the files and records in this case, and such further
3 evidence and argument as the Court may permit.

4 Dated: July 24, 2022

Respectfully submitted,

5 STEPHANIE S. CHRISTENSEN
6 Acting United States Attorney

7 SCOTT M. GARRINGER
8 Assistant United States Attorney
9 Chief, Criminal Division

10 /s/

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Gabriel Zendejas-Chavez ("defendant") will soon stand
4 trial on charges that he conspired to participate in the affairs of
5 the Mexican Mafia Los Angeles County Jail Enterprise through a
6 pattern of racketeering activity, conspired to engage in drug
7 trafficking, and aided and abetted the distribution of drugs. At
8 trial, the government intends to prove that defendant used his
9 position as an attorney to facilitate the Mexican Mafia's
10 racketeering activities by, among other means, passing messages to
11 incarcerated members and associates about essential Mexican Mafia
12 business like the status and territories of members, the identities
13 of cooperating witnesses, orders to assault individuals in bad
14 standing, plots to intimidate witnesses, a plot to extort a rival
15 gang, and more.

16 Defendant has represented that he may present a duress defense.
17 But he has not, and cannot, make a prima facie showing of duress
18 sufficient to present a duress defense to the jury, or receive a jury
19 instruction on duress. Therefore, the government moves to preclude
20 defendant's presentation of a duress defense to the jury.

21 **II. DEFENDANT IS NOT ENTITLED TO A DURESS DEFENSE**

22 A defendant may not present a duress defense to the jury, or
23 receive a jury instruction on duress, unless he has made a prima
24 facie showing of duress in a pre-trial offer of proof. United States
25 v. Ibarra-Pino, 657 F.3d 1000, 1004 (9th Cir. 2011). "[T]o make a
26 prima facie showing for a duress defense or a jury instruction, a
27 defendant must establish: (1) an immediate threat of death or serious
28 bodily injury, (2) a well-grounded fear that the threat will be

1 carried out, and (3) lack of a reasonable opportunity to escape the
2 threatened harm." Id. (internal quotation marks and citation
3 omitted). "In the absence of a prima facie showing of duress,
4 evidence of duress is irrelevant and may be excluded, and a jury
5 instruction is not appropriate." Id. at 1004-05 (citations omitted).
6 Fear, alone, is not enough to merit the defense or instruction.
7 United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996) (citation
8 omitted).

9 With regard to the first element, "immediacy requires that there
10 be some evidence that the threat of injury was present, immediate, or
11 impending. '[A] veiled threat of future unspecified harm' will not
12 satisfy this requirement." United States v. Contento-Pachon, 723
13 F.2d 691, 694 (9th Cir. 1984) (quoting Rhode Island Recreation Center
14 v. Aetna Casualty and Surety Co., 177 F.2d 603, 605 (1st Cir. 1949)).
15 The threat "may be express or implied, so long as it is an immediate
16 threat as distinguished from generalized fear." United States v.
17 Navarro, 608 F.3d 529, 533 (9th Cir. 2010). The threat to the
18 defendant or the defendant's family must be "present, immediate, or
19 impending," (Contento-Pachon, *supra*, at 694), such that the
20 defendant's persecutors "figuratively held a gun to his head" (or to
21 his family's heads) compelling the defendant to commit the illegal
22 action. United States v. Shryock, 342 F.3d 948, 988 (9th Cir. 2003);
23 see also United States v. Becerra, 992 F.2d 960, 964 (9th Cir.1993)
24 (no prima facie showing of immediacy in a year-long scheme to
25 distribute cocaine and heroin even though defendant testified the
26 person that threatened him was in the defendant's restaurant
27 "constantly" and "even parked outside [defendant's] apartment on one
28 of his days off").

1 As to the second element, the formula is addressed to the impact
2 of a threat of force upon a reasonable person: The fear must be
3 "well-grounded." There must be no "reasonable" opportunity to
4 escape. The formula is in harmony with the analysis of duress in the
5 Model Penal Code which recognizes duress in the use of unlawful force
6 "that a person of reasonable firmness in his [or her] situation would
7 have been unable to resist." American Law Institute, Model Penal
8 Code § 2.09(i) (1985). In determining if the fear was "well-
9 grounded," the defense does permit the fact-finder to take into
10 account the objective situation in which the defendant was allegedly
11 subjected to duress. Fear that would be irrational in one set of
12 circumstances may be well-grounded if the experience of the defendant
13 with those applying the threat is such that the defendant can
14 reasonably anticipate being harmed on failure to comply. United
15 States v. Johnson, 956 f.2d 894 (9th Cir. 1992).

16 As to the third element, "[t]he opportunity to surrender to the
17 authorities on reaching a point of safety presents an opportunity to
18 escape the threatened harm." Ibarra-Pino, 657 F.3d at 1005. "A
19 defendant takes 'the opportunity to escape the threatened harm' where
20 the defendant 'cooperate[s] with authorities' at the first
21 opportunity to do so without alerting an observer and 'submit[s] to
22 authorities at the first reasonable opportunity' by consenting to a
23 search." Id. at 1006 (quoting Contento-Pachon, 723 F.2d at 695).

24 In the instant matter, on July 11, 2022, counsel for defendant
25 emailed government counsel that she was "noticing [defendant's]
26 intent to raise two affirmative defenses: duress and entrapment,"
27 without more. The government requested a pre-trial offer of proof to
28 support defendant's prima facie showing of duress that same day. But

1 defendant has yet to respond, likely because he cannot make such a
2 showing. As the evidence at trial will show, defendant used his
3 status as an attorney to assist Enterprise members with their illicit
4 activities over a several year period. He travelled to various penal
5 institutions where he smuggled messages to in-custody co-
6 conspirators. He hosted co-conspirators at his office to discuss
7 Mexican Mafia business. And he did so of his own volition, not out
8 of duress. In addition, and perhaps most importantly, despite his
9 knowledge of the criminal justice system as a criminal defense
10 attorney, and the fact that his most powerful coconspirators were in
11 custody, defendant never attempted to escape any alleged harm. Thus,
12 he cannot make a prima facie showing to support a the presentation of
13 a duress defense because he did not act under duress.

14 **III. CONCLUSION**

15 For the foregoing reasons, the government respectfully requests
16 that this Court preclude defendant from presenting a duress defense
17 to the jury.